

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: April 30, 2001
Defendants.)	

RESPONSE AND BRIEF OF THE UNITED STATES
IN OPPOSITION TO MOTION TO DISCOVER
PRESENTENCE REPORTS OF GOVERNMENT WITNESSES

I
INTRODUCTION

Defendants have filed a *Motion to Discover Presentence Reports of Government Witnesses and Brief in Support Thereof* (“Motion”) asking this Court to issue an order instructing the U.S. Probation Department to provide copies of the Presentence Reports of C&S News Agency, Inc., Rack Shop (DE), Inc., and Island Periodicals, L.L.C., to the defendants. In the alternative, the defendants ask this Court to review in camera the above Presentence Reports and divulge to them any portion deemed appropriate and relevant under the law.

Defendants’ Motion should be denied in part because it does not comport with Fifth Circuit case law, and in part because it is premature.

II LAW AND ARGUMENT

A. THE UNITED STATES IS AWARE OF ITS DISCOVERY OBLIGATIONS AND HAS FULFILLED THEM

The gist of defendants' Motion is that the presentence reports contain Brady/Giglio information favorable to the defendants. The United States is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), and has fulfilled its obligations.¹ The government is aware of no Brady/Giglio information in the requested presentence reports that has not already been disclosed.

The defendants are mistaken if they believe Brady requires that favorable information be disclosed in a particular manner or form. It does not. For example, it is clear that defendants are not entitled under Brady or Giglio to the actual grand jury transcripts or Jencks statements, but only the information itself. See, e.g., United States v. Grossman, 843 F.2d. 78, 84-85 (2nd Cir. 1988), cert. denied, 488 U.S. 1040 (1989) (Defendant not entitled to grand jury transcript containing exculpatory information, only the information); United States v. Five Persons, 472 F. Supp. 64, 69 (D. N.J. 1979) (Neither Brady nor Jencks require actual "statement" to be disclosed, only the information). Here, the United States has produced more than 120 boxes of materials, including plea agreements, immunity orders, informal immunity letters, proffer letters, and various witness statements in compliance with Rule 16. To the extent to which these documents and materials may contain Brady or Giglio information, it is equally available to the

¹ Defendants assert in their Motion that they have a "reasonable belief" that the United States is aware of exculpatory or impeaching information contained in the requested presentence reports and thus is under some obligation imposed by Brady to not oppose this Motion. The United States knows of no obligation imposed by Brady that would preclude its Response to defendants' Motion.

defendants.² In addition, the United States sent defendants a letter on February 12, 2001, detailing information that might arguably be exculpatory or impeaching. That Brady/Giglio material was obtained from a review of transcripts of grand jury testimony and information from witness interviews as well as the requested presentence reports.

As the government's February 12 letter to each defendant informed them, the United States is aware of its continuing disclosure obligations under Brady and Giglio, and will notify the defendants promptly in the event that any further information is determined to fall within Brady or Giglio.

B. GIVING DEFENDANTS ACCESS TO THE PRESENTENCE REPORTS IS NOT WARRANTED

Federal Rule of Criminal Procedure 32 governs presentence investigations and reports. Access by third parties to presentence reports is found nowhere in Federal Rule of Criminal Procedure 32.

1. The Fifth Circuit Has Held That A Presentence Report Is Not A Jencks Act Statement

In their Motion, the defendants state their belief that Mark Cohen and Brian Weiner will be called as witnesses by the government. Presumably the defendants are claiming that they are thus entitled to the presentence reports of C&S News, Rack Shop, and Island Periodicals because these reports may contain Jencks statements. However, the Fifth Circuit has held that a presentence report is not a Jencks statement. United States v. Jackson, 978 F.2d 903, 909 (5th

² United States v. Grossman, 843 F.2d 78, 85 (2nd Cir. 1988) (“Brady does not require the government to turn over exculpatory evidence ‘if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.’”) (quoting United States v. Gaggi, 811 F.2d 47, 59 (2nd Cir. 1987), cert. denied, 107 S.Ct. 3214 (1987)).

Cir. 1992), cert. denied, 508 U.S. 945 (1993). Defendants are thus not entitled to the presentence reports on this ground.

2. Access To Presentence Reports By Third Parties Is Strictly Limited By Courts

Although some courts have granted access to presentence reports to third parties, this access is strictly limited by courts. As noted by the Supreme Court in United States Department of Justice v. Julian, 486 U.S. 1, 12 (1988), “the courts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals.” The reason for this is the “fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report.” Id. (citing United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977)). Another reason that access to third parties is so limited is that these reports contain confidential information. As stated by the Fifth Circuit in United States v. Huckaby, 43 F.3d 135, 138 (5th Cir. 1995):

The ordinary confidentiality of presentence reports is supported by powerful policy considerations. . . . First, the defendant has a privacy interest in the presentence report because it reveals not only details of the offense but, in the broadest terms, “any other information that may aid the court in sentencing ...” A PSIR routinely describes the defendant's health, family ties, education, financial status, mental and emotional condition, prior criminal history and uncharged crimes. That the defendant has pled guilty or been convicted of a crime does not require the dissemination of his entire personal background in the public domain.

See also United States v. Smith, 13 F.3d 860, 867 (5th Cir. 1994), cert. denied, 511 U.S. 1134 (1994) (“[T]here is a general presumption that courts will not grant third parties access to the presentence reports of other individuals.”).

Third parties seeking disclosure of presentence reports have had to demonstrate a compelling need for the information contained in the reports. The Huckaby Court stated that, “only where a ‘compelling, particularized need for disclosure is shown should the district court disclose the report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need.’” Id. at 138 (quoting and citing United States v. Corbitt, 879 F.2d 224, 230 (7th Cir.1989)). Here, the defendants have made no showing whatsoever. In their Motion, the defendants simply make the bald assertion that the presentence reports “contain material and information which is favorable to the defendants on the issue of guilt or innocence.” Motion, p.1. Indeed, the defendants and their counsel go further than this, alleging that the United States is aware of this information and has not disclosed it. However, the defendants in no way attempt to inform the Court as to the nature or extent of this supposed exculpatory information. As stated above, the United States is not aware of any exculpatory or impeaching information in the presentence reports that has not already been disclosed to defendants.

3. Balance Struck By The Fifth Circuit

The Fifth Circuit has struck a balance between the confidentiality of the information contained in presentence reports and the right of third-party criminal defendants to Brady/Giglio information contained in the presentence reports of co-conspirators. In United States v. Jackson, 978 F.2d 903 (5th Cir. 1992), cert. denied, 508 U.S. 945 (1993), the Fifth Circuit stated that:

[A] defendant ordinarily has a right to exculpatory or impeachment material that is contained in the presentence reports of his co-defendants. Because presentence reports are necessarily confidential, the district court should examine the report in camera and release any exculpatory or impeachment material to the

defendant while protecting the confidentiality of the rest of the report.

Id. at 909 (citations omitted).

Shortly after Jackson was decided, the Fifth Circuit expanded its new rule to include the presentence reports of government witnesses testifying against the defendant who were also co-conspirators. United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994).

What Jackson and Carreon do not hold is that defendants are entitled to the presentence reports themselves.³ Therefore, defendants' request that this Court order the presentence reports to be disclosed directly to them is unsupported by law and should be denied.

C. THE DEFENDANTS' MOTION IS PREMATURE

Even if this Court decides that an in camera inspection of the presentence reports is necessary, defendants' Motion asking the Court to conduct such an inspection now is premature. Jackson and its progeny suggest that such an inspection is conducted only after a co-conspirator witness has testified for the government. It is only at that time, and not before, that the Court can make an informed decision as to whether the presentence report contains any exculpatory or impeachment material. See Jackson, 978 F.2d 903; Carreon, 11 F.3d 1225; United States v. Gaytan, 74 F.3d 545, 557 (5th Cir. 1996), cert. denied, 519 U.S. 821 (1996); U.S. v. Wallace, 32 F.3d 921, 930 (5th Cir. 1994) (review made during the testimony of government witness/

³ There has been only one Fifth Circuit case that allowed third parties access to the actual presentence report, and even in that case, access was limited to only those portions where a compelling, particularized need was demonstrated. United States v. Huckaby, 43 F.3d 135 (5th Cir. 1995). In Huckaby, the appellate court held that the district court had not abused its discretion in releasing a presentence report because the court had "acted under a felt, compelling necessity of relieving racial tension" and there was a "particularized need for the revelation of facts found in the PSIR, because only [information found in the presentence report] would persuade the public of [the defendant's] culpability." Id. at 140 (emphasis added).

co-conspirator). Therefore, any in camera inspection that the Court deems necessary should be conducted after any relevant government witness has testified.

III
CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to deny defendants' Motion.

Respectfully Submitted,

SCOTT M. WATSON
Chief, Cleveland Field Office

“/s/”
RICHARD T. HAMILTON, JR.
Ohio Bar Number--0042399

MICHAEL F. WOOD
District of Columbia Bar Number--376312

KIMBERLY A. SMITH
Ohio Bar Number--0069513

SARAH L. WAGNER
Texas Bar Number--24013700

Attorneys, Antitrust Division
U.S. Department of Justice
Plaza 9 Building, Suite 700
55 Erieview Plaza
Cleveland, OH 44114-1816
Telephone: (216) 522-4107
FAX: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

Richard Alan Anderson, Esq.
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

Michael P. Gibson
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

“/s/”
RICHARD T. HAMILTON, JR.